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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 601

LESLIE D. STICKLER,

Appellant,

vs.

THE STATE OF OHIO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

JURISDICTIONAL STATEMENT.

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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. _____.

LESLIE D. STICKLER,

Appellant,

vs.

THE STATE OF OHIO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

JURISDICTIONAL STATEMENT.

Appellant appeals from the judgment of the Supreme Court of Ohio, entered first on March 20, 1963, affirming the Court of Appeals, First Appellate District, Hamilton County, Ohio. Rehearing was denied on April 24, 1963. The Court of Appeals had affirmed a judgment of conviction following a jury verdict in the Court of Common Pleas, Hamilton County, Ohio.

Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW.

The Supreme Court of Ohio wrote no formal opinion but dismissed the appeal *sua sponte* for lack, in its view, of a "debatable constitutional question." The action is reported in 174 Ohio St. 382 (1963) (Tr. I, 181).[1] Neither the Court of Appeals, First Appellant District, Hamilton

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[1] The *Certified Transcript of Record* in the Supreme Court of Ohio is in two parts. Reference to one part will be indicated by the prefix "Tr." and "I" followed by the page number. The Notice of Appeal to the Supreme Court of the United States is part of such Certified Transcript of the Record but carries its own pagination and is not numbered seriatim with the balance of the papers certified. Accordingly, when reference to the Notice of Appeal is intended, the reference will be to "Tr. I, Notice of Appeal" with the appropriate page reference. References to the remaining record in the case, as certified by the Supreme Court of Ohio, will be by the prefix "Tr." and "II." This second part of the Supreme Court's certification is a compilation of docket and journal entries from the Court of Appeals, First Appellate District, Hamilton County, Ohio. Pagination has been supplied and references to "Tr. II" will be followed by the supplied page numbers for convenience. Still a third part of the record is the verbatim reproduction of the testimony, exhibits, rulings and charge in the trial court. This part of the record is marked "Bill of Exceptions" in large print and will be indicated under the general category "Bill of Exceptions" by use of the prefix "B of E" and/or whatever page numbers and internal description is necessary for clarity, e.g. "charge of the court," "State Exhibit 2" etc. A fourth part of the record submission is composed of the two folios of *voir dire omitted* from the transcript on Appeal and filed with the Criminal Division, Hamilton County, Ohio, Clerk of Courts on October 15, 1963. One folio, that containing *voir dire* for June 15, 1961, is marked "A" and will be referred to as "Folio A" followed by a page number. The folio of the *voir dire* for June 16, 1961, is marked "B" and will be referred to as "Folio B" followed by a page number. A fifth item is the certificate of the trial court certifying the omission of Folios A and B from the original record furnished Appellant. This certificate was filed on October 15, 1963, and will be referred to as the "Certificate of Omission" and is reproduced at Appendix 59. A sixth item is the statement made on television on the evening of June 15, 1961, the first day of Appellant's trial. This statement was offered in evidence but refused (see B of E, 12-18) and not attached to the Bill of Exceptions. The statement is marked as "Andrews Statement" and reproduced at Appendix 59.

County, Ohio, nor the trial court wrote an opinion. (See Appendix 53 to 54.)

JURISDICTION.

Appellant was indicted under Sections 1707.01-1707.45 of the Revised Code of Ohio on May 12, 1961, on four counts (Tr. II, 14-15). He was tried and found guilty on all four counts of "violating Section 1707.44 Ohio Revised Code" by a jury in the Court of Common Pleas, Hamilton County, Ohio on June 26, 1961 (Tr. II, 58). Thereafter on August 11, 1961, he was sentenced to serve sentences of not less than one nor more than five years on each count—the sentences to run concurrently (Tr. II, 65). The Court of Appeals, First Appellate District, Hamilton County, Ohio, affirmed the conviction (Tr. I, 148) and the Supreme Court of Ohio dismissed the appeal on March 20, 1963 (Tr. I, 181) and denied an application for re-hearing (Tr. I, 182-191) on April 24, 1963 (Tr. I, 4, 6). Notice of appeal was filed with the Clerks of all three courts on July 22, 1963 (cf. Tr. I, Notice of Appeal, 1) on the theory that all were possessed of the record or parts of it. (See Rule 10, para. 3, Revised Rules of the Supreme Court of the United States.)

Upon Appellant's application pursuant to the "Revised Rules" of this Court, 13(1), the time for docketing in the Supreme Court of the United States was extended by the Chief Justice of the Ohio Supreme Court until November 1, 1963 (entry dated August 5, 1963, reprinted in Appendix 67).

The jurisdiction of the Supreme Court of the United States to review this conviction and judgment on appeal is conferred by Title 28 USC § 1257(2). The following cases sustain the jurisdiction of the Court to review the judg-

ment and conviction on appeal in this case under the stated statutory section: [2] *Morrison v. California*, 291 U. S. 82, 83, 93, 96 (1934); cf. *Speiser v. Randall*, 357 U. S. 513, 515, 521-526, 529 (1958); *Lovell v. Griffin*, 303 U. S. 444 (1938); *Marsh v. Alabama*, 326 U. S. 501, 502 (1946); *Winters v. New York*, 333 U. S. 507, 509, 519-520 (1948); *Kunz v. New York*, 340 U. S. 290, 292, 295 (1951); *Butler v. Michigan*, 352 U. S. 380, 383-384 (1957). Should the court determine that the constitutional issues raised here or any of them, are improvident for appeal, then the Appellant asks that this statement be treated as a petition for a writ of certiorari, Title 28 USC § 2103.

STATUTES INVOLVED.

Apparently, Ohio Revised Code Sections 1707.01 to 1707.45, inclusive, are part of the "boiler plate" of the indictment in cases of the type involved here (see Tr. II, 14-15). However, the language of the indictment indicates that Sections 1707.14 and 1707.44 encompass the specific violations intended to be alleged. The verdict (Tr. II, 58) refers to "violating Section 1707.44" as does the entry of judgment (Tr. II, 65). Therefore only these sections, and other sections from 1707.01-1707.45 in the parts deemed relevant by the Appellant, are reproduced in the Appendix. These include Sections 1707.01, 1707.02, 1707.14, 1707.44 and 1707.45. The latter section is the important burden of proof section. Also under challenge here, and repro-

[2] Some of the cases listed were decided under predecessor statutes providing for appeal when a state statute or local ordinance was claimed to be invalid as repugnant to the Constitution of the United States and the decision of the highest state court in which decision could be had was in favor of validity. The import of Title 28 USC § 1257 (2) and its predecessors is identical for all purposes pertinent here.

duced in the Appendix, is Ohio Revised Code Section 2945.59. Section 2953.03 provides for indigents' transcripts and is reproduced in the Appendix. (See Appendix 54 to 58.)

QUESTIONS PRESENTED.

The following questions are presented by this appeal.[3]

(1) Whether Appellant's conviction under Ohio Revised Code Section 1707.01 through 1707.45, as amended, is contrary to the due process clause of the Fourteenth Amendment to the United States Constitution because of the vagueness, uncertainty, and lack of explicitness in the standards of prohibited conduct defined in the aforesaid statute both on its face and as applied to this Appellant.

(2) Whether Ohio Revised Code Section 1707.02(G) required Appellant to determine at his peril that he was dealing in an exempt security thus imposing an arbitrary, unreasonable and oppressive standard in violation of that due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

(3) Whether the Appellant was denied effective right to counsel contrary to the Sixth and Fourteenth Amendments to the United States Constitution when he was forced:

(a) to defend against an indictment thirty-two days old which was one of a series of fifteen indictments and not the lowest numbered one,

(b) to prepare for trial eight days after notice that the particular indictment would be on for trial rather than the lowest numbered one,

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[3] These questions are the identical questions listed in the Notice of Appeal. Only their order has been changed.

(c) to prepare for trial while relevant documents were in the possession of the federal authorities who had seized Appellant's records in connection with a pending federal indictment later dismissed, and

(d) to prepare on short notice while motions and rulings on motions relevant to the particular indictment were still pending.

(4) Whether Appellant's trial and conviction under Ohio Revised Code Section 1707.45, requiring him to sustain the burden of proving the non-public nature of the promissory notes executed by him, violated the due process clause of the Fourteenth Amendment to the Constitution of the United States both on its face and as applied to this Appellant by putting on him the burden of disproving an essential element of the crime before the state made its proof, or any proof, on that element.

(5) Whether the trial court's denial of Appellant's motion for a change of venue deprived Appellant of a fair trial and due process of law contrary to the Sixth and Fourteenth Amendments to the Constitution of the United States in the light of the newspaper, radio, and television publicity accorded the incidents giving rise to the indictment and the trial and, in particular, the publicity given an incident involving the disappearance and death of a defendant in a companion case, with attendant notoriety purporting to link the Appellant to the disappearance and, by inference, the death.

(6) Whether the trial court's denial of Appellant's motion for reinterrogation of the seated jury before the trial and the whole panel after the trial began was denial of fair trial and due process contrary to the Sixth and Fourteenth Amendments to the Constitution of the United

States (a) because of a television broadcast, which occurred during the period of the impaneling, blaming Appellant for the disappearance of the defendant in a companion case and (b) because of the radio, television and newspaper coverage of the discovery of the dead body of the aforesaid defendant while Appellant's trial was in progress.

(7) Whether the trial court's ruling that the prosecution's proof was not limited by the indictment and its admission of evidence to prove that misrepresentation induced both of the note transactions charged in the indictment, and other unrelated note transactions, denied Appellant a fair trial and due process of law contrary to the Sixth and Fourteenth Amendments to the Constitution of the United States by adding an element—misrepresentation—thus changing the crimes in the indictment and putting before the jury evidence of crimes not charged.

(8) Whether the trial court's allowance of cross-examination of Appellant implying a dishonest role for him in the failure of a business venture unrelated to the indictment on trial denied Appellant a fair trial and due process of law contrary to the Sixth and Fourteenth Amendments to the Constitution of the United States.

(9) Whether the trial court's permitting testimony, on the authority of Ohio Revised Code Section 2945.59 allowing evidence relating to transactions allegedly similar to those included in the indictment, in the face of Appellant's admission that the promissory notes covered by the indictment were made by him, denied Appellant a fair trial and due process of law contrary to the Sixth and Fourteenth Amendments to the United States Constitution and, independently, deprived Appellant of due process of law contrary to the same Fourteenth Amendment by allowing

the jury, in effect, to consider evidence of crimes other than those for which the Appellant was on trial.

(10) Whether Appellant was denied due process of law contrary to the Fourteenth Amendment to the Constitution of the United States when he was indicted for alleged violations of Ohio Revised Code Sections 1707.01-1707.45 and, more specifically (a) for selling securities without a license contrary to Ohio Revised Code 1707.44-(A) and (b) for selling an unregistered security contrary to Ohio Revised Code 1707.44(C) but convicted, in effect, of another crime, i.e. for false representation under Ohio Revised Code 1707.44(B) by the repeated admissions, over objection, of testimony relating to alleged misrepresentation both as to promissory notes covered by the indictment and other promissory notes not covered by the indictment.

(11) Whether the perjury of a principal fact witness for the prosecution bearing directly on the non-public nature of the promissory notes issued by Appellant, under the exemption in Ohio Revised Code Section 1707.02(G), deprived Appellant of a fair trial and due process of law contrary to the Sixth and Fourteenth Amendments to the Constitution of the United States.

(12) Whether the trial court's allowing the prosecution, over objection, to argue to the jury that Appellant was an embezzler, absent any evidence whatever on that issue, denied Appellant a fair trial and due process of law contrary to the Sixth and Fourteenth Amendments to the Constitution of the United States.

(13) Whether the trial court's charge, in reading into the exemption for promissory notes in Ohio Revised Code Section 1707.02(G), the requirements that a "bona fide" sale must be made in "good faith in the ordinary

course of legitimate business or borrowing" does not expand the requirements of Ohio Revised Code Section 1707.02(G), and, in effect, constitutes *ex post facto* criminal legislation by the trial court contrary to Article I, § 10 of the Constitution of the United States in that it introduces and charges a new crime not formulated by the statutes of Ohio and not contained in the indictment.

(14) Whether the trial court's charge to the jury on "investments" and statements on the same subject in the presence of the jury coupled with its refusal to allow the Appellant to adduce evidence on the nature of the note transactions on which the indictment was based, denied Appellant a fair trial and due process of law contrary to the Sixth and Fourteenth Amendments to the Constitution of the United States.

(15) Whether the trial court's refusal of Appellant's request to include the *voir dire* examination of prospective jurors in the Bill of Exceptions, which was provided Appellant because of his inability to pay, denied him appellate review solely on the basis of his ability to pay contrary to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

(16) Whether the conviction of the Appellant was contrary to the Sixth and Fourteenth Amendments to the Constitution of the United States because the accumulation of errors by the trial court in the conduct of the trial and the charge to the jury effectively deprived Appellant of a fair trial and due process of law.

STATEMENT OF THE CASE.[4]

Appellant made two loans from one Steffen at extremely high rates of interest and in return gave Steffen two promissory notes. On each note Appellant obligated himself to repay six thousand dollars ($6000.00) although each loan amounted to only five thousand dollars ($5000.00) (B of E, 78-80, State's Exhibits Nos. 3 and 4). The extra one thousand dollars ($1000.00) in each instance represented interest (B of E, 78-80). One note was due in thirty (30) days; the other in sixty (60) days (B of E, State's Exhibits Nos. 3 and 4 respectively). Appellant had not advertised in any way to secure Steffen or any other borrower (B of E, 325).

The transaction generating State's Exhibits Nos. 3 and 4, *ibid.*, as described, formed the basis for the counts in the indictment of Appellant (Tr. II, 14-15 [the indictment] and 32-33 [the bill of particulars]). Appellant was convicted (Tr. II, 58 [the verdict]) of selling securities without a license on two counts (first and third, Tr. II, 14-15 [the indictment]) and of selling unregistered securities on two counts (second and fourth, Tr. II, 14-15 [the indictment]).

PRELIMINARY PROCEEDINGS.

After the indictment, the Appellant filed motions for a continuance (Tr. II, 22); a bill of particulars (Tr. II, 23); to produce and return records (Tr. II, 25); demurrers to all counts of the indictment (Tr. II, 35, 38); motions to quash all counts of the indictment (Tr. II, 36, 37); a motion to dismiss (Tr. II, 39); and a motion for change of venue (Tr. II, 40).

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[4] The multiplicity and nature of the issues here require a somewhat expanded statement of the case.

The motion for continuance was first denied (Tr. II, 29, B of E, 2) and then renewed and summarily overruled just before the impaneling of the jury (B of E, 4-5). Although the present indictment had been returned on May 12, 1961 (Tr. II, 17) and the trial began on June 15, 1961, it was but one of the fifteen returned against Appellant on the same day (Tr. I, 26) and was not the lowest in number (Tr. I, 27). Appellant's counsel was involved in other trials in the same court during this period (B of E, 6-7) and had extremely short notice that this particular indictment would be on for trial (B of E, 6-7; Tr. I, 27). At this time Appellant was also under federal indictment for fraud by wire (Tr. I, 26) and all his records, documents, and memoranda pertinent to the present indictment had been seized and were in the custody of the United States Government. The Appellant contended that he could not defend or aid in the defense to the current indictment (Tr. II, 25-26). Appellant moved in the state court for the return of these records (Tr. II, 25), setting out their necessity, at the same time he moved for a continuance (Tr. II, 22) and for a bill of particulars (Tr. II, 23; cf. B of E, 2).

The date of the motions was June 9, 1961 (see Tr. II, 22, 23, 25), just six days before the trial began on June 15, 1961 (B of E, 4 *et seq.*).

The record will indicate that the motions for continuance and for return of the records were both overruled on June 12, 1961 (Tr. II, 29, 30, B of E, 2).

A part of the motion for a bill of particulars having been previously granted on the latter date (Tr. II, 31, B of E, 2), and the ruling complied with the same day (Tr. II, 32-33), demurrers and motions to quash and dismiss were filed (Tr. II, 35, 36, 37, 38, 39). These were overruled on

the 15th day of June, 1961, the day the trial opened (B of E, 5; Tr. II, 43-44, 45-46, 47).

A motion for a change of venue on June 15, 1961 (Tr. II, 40) was first held in abeyance (B of E, 7-9) and then overruled on June 16, 1961 (Tr. II, 53).

Collectively these preliminary motions and supporting arguments and briefs raised and saved, prior to trial, the following issues relevant to this appeal:

1. Inadequate time to prepare for trial (Tr. II, 22; B of E, 6-9).

2. Radio and television coverage of such quality and amount as to jeopardize the possibility for a fair and impartial jury (Tr. II, 40; B of E, 7).

3. Inability of the Appellant to defend himself, aid in his defense or prepare for trial for lack of those records and other paper writings pertinent to the issues on trial under the present indictment (Tr. II, 25-26).

4. Standards of conduct imposed by the relevant Ohio statutes lacked the explicitness constitutionally required of criminal enactments (Tr. II, 39, para. 5).

THE TRIAL.

1. Just before the commencement of Appellant's trial, a similarly indicted defendant, John Ruf, disappeared. Appellant's problems were already receiving extensive attention from the press, radio and television. On the evening of June 15, 1961, the day Appellant's trial began, Ruf's attorney appeared on television. In effect, he blamed Appellant for Ruf's disappearance (see Andrews Statement, Appendix 59). The next morning Appellant's trial counsel brought the telecast to the court's attention out of the presence of the jury (B of E, 12-13). Counsel had

previously attempted to secure a continuance and change of venue because of the saturation of the community with adverse publicity (B of E, 4-9) and many jurors, during the impaneling, had admitted reading of the Stickler matter as the transcript of the initial *voir dire* would have demonstrated at the state appellate level had it been allowed. The jurors disclaimed influence (see para. 2 under "Post Trial" *infra*, pages 29-30). At this point trial counsel advised the court that the broadcast transcription had been subpoenaed to support a new motion for a change of venue (B of E, 13, 19, see also Appendix 59). The court refused to view the telecast (B of E, 13), refused to allow its introduction into evidence (B of E, 17-18) and permitted trial counsel only a limited right to reinterrogate the panel (B of E, 16-18). The motion for change of venue was overruled (B of E, 19).

On the restricted re-examination (*voir dire* omitted B of E, 16) three jurors admitted seeing the telecast (Folio B, 7, 16, 33) and one stated that anyone seeing it would be prejudiced against Appellant (Folio B, 8-9). He was excused (Folio B, 9). The others disavowed influence, although one said "I may have formed an opinion" (Folio B, 18). As to these two, one challenge for cause was disallowed (Folio B, 18-19) and one was not challenged (Folio B, 35-39).[5] In any event, Ohio Revised Code, Section 2945.25(B) would not allow challenge for cause if the prospective juror says he can be impartial and the trial court is satisfied he means it. All peremptory challenges having been exhausted (B of E, 17, 19), the jurors re-

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[5] See Appendix 60-66 for a resumé of *voir dire* on this point. The *voir dire* was omitted from the transcript provided Appellant at the state's cost and not filed until October 15, 1963, more than two years after the trial ended and months after the state appellate processes were exhausted.

mained. Eleven of twelve had heard, read or seen something on television about the case.

On the following Monday, June 20, 1961, while the trial was in progress, Ruf was found on the north bank of the Ohio River. He had been shot in the head and had drowned. All the news media worked this into an already concentrated coverage of Appellant's trial. Murder and suicide were the subject of speculation and through it all ran the implication of Appellant's responsibility (B of E, 161-162).

On Tuesday morning June 21, 1961, trial counsel brought these developments to the attention of the court and moved anew for reinterrogation of the jurors to canvass this new development and its influence, if any (B of E, 161-162). This motion, the court said, was "overruled instantly" (B of E, 161). Counsel indicated for the record that the purpose of his request was to determine whether the publicity attendant upon the discovery of Ruf's body had been heard or seen by any juror and whether it had resulted in the juror's forming an opinion. This, counsel emphasized, was a preface, dependent on elicited facts, to a motion for withdrawal of a juror and a mistrial (B of E, 161-162). The trial court refused to allow additional interrogation of the panel with this remarkable statement:

> The Court: No, I can't assume the jury is influenced. Whether they were momentarily, they have been instructed. At the time the case is submitted to them, that is the time. Their mind (sic) fluctuates one side to the other, of course, during the progress of the trial. It wouldn't be human if it didn't. However, at the time the case is submitted to them for deliberation, their minds must be open, and then start, whatever their mind is at at that time, start anew to consider the evidence and the instructions of the Court. Your motion is overruled. (B of E, 162).

The jurors separated for the night at the end of each day's trial (see p. e., B of E, 38, 156, 203, 301). There was no instruction respecting publicity in the charge (cf. B of E, 433-452; 454-460).

2. The trial court refused to allow cross-examination of the representative of the Ohio Division of Securities on the full function of that agency to show that one of its duties included the protection of Appellant from usury (B of E, 52). The representative had described those activities of the Division which the prosecution presumably thought unfavorable to Appellant, i.e., the security registration and sales licensing functions (B of E, 46-49).

Further limitations on, and interference with, cross-examination restricted Appellant's credibility testing and prevented Appellant from showing that the complaining witness named in the indictment (Tr. II, 14-15), was in fact lending money at usurious rates, had a desire for "fast money" (B of E, 83-86), and that Appellant's transactions (B of E, 62, 79) with the witness were regular, bona fide loan transactions (B of E, 74, 80, 85, 101, 104-107, 139-144, 248-249). This denial was accompanied by a court-injected theory that the facts respecting the various witnesses' transactions with Appellant indicated a sharing in the interest rate received by the latter (B of E, 74). Appellant's trial counsel moved for a mistrial and was overruled (B of E, 75).

The trial court conducted a cross-examination of its own (B of E, 93-94) which called for and allowed incompetent hearsay answers (B of E, 93-94; 96-97), included an argumentative cross-examination of Appellant's counsel (B of E, 249-250), and injected the Court's theory of the facts suggesting misrepresentation to secure money for investment and Appellant's leading role in it—all in the

jury's presence (B of E, 80, 90-91; 96-97; 104; 194-195; 277-278; 280-281).

There were additional strictures imposed on Appellant's counsel's cross-examination during which he attempted to show arrangements to secure Appellant's borrowings, e. g., life insurance (B of E, 134-135) and additional security requirements (B of E, 135), as well as that testing credibility (B of E, 149-150. See also a series of limiting rulings at B of E, 107, 114, and 115).

3. Witness Robert Steffen testified to the loan and note transactions which are the subject of indictment here (B of E, 62, State's Exhibits Nos. 3 and 4) and thereafter was permitted to answer prosecution's questions, relating to the use Appellant stated he was going to make of the money (B of E, 62-65; 94). The text of the indictment shows it was not an indictment for fraud or misrepresentation. Appellant's trial counsel moved unsuccessfully to strike all reference by the witness to misrepresentation (B of E, 116-118).

4. The only testimony (B of E, 53-115) offered by the State failed to prove that the particular notes (B of E, State's Exhibits Nos. 3 and 4) covered by the indictment were for public sale. The trial court conceded this failure (B of E, 119). Ohio Revised Code, Section 1707.45 places the burden of proving the applicability of an exemption on the beneficiary. In this case that put the burden of proving the non-public nature of his promissory notes on the Appellant (Appendix 57).

5. Seven witnesses, over objection (B of E, 122, 168, 171, 204-205; 225, 240, 255), were permitted to testify as to other note transactions (see State's Exhibits Nos. 10-33) not involved in the indictment (Shapiro, B of E, 120 et seq.; Morrissey, B of E, 163 et seq.; Winter, B of E, 170 et seq.;

Sestito, B of E, 204 et seq.; Fidler, B of E, 222 et seq.; Mondor, B of E, 239 et seq.; and Katzman, B of E, 255 et seq.). Each of these witnesses discussed alleged misrepresentations made to him as part of a particular transaction by Appellant (see B of E, 124-125; 165; 174-175; 206; 208-210; 225-226; 242-243; 258; 259-260, respectively). The trial court had ruled previously that the scope of the State's proof was not confined by the indictment (B of E, 118-119)[6] and restricted Appellant's counsel in his efforts to establish the nature of the transactions as private loans (p. e., B of E, 115; 134-135; 216-217; 230-232; 290-295).

6. The prosecutor made reference, in his opening, to the King Adjustment Company with which Appellant had been associated in the early stages of his practice (B of E, 22-23). Trial counsel responded in his opening for the Appellant. He explained that Appellant had incurred what he deemed to be a moral obligation to pay at least a half of the debts of King Adjustment Company and, in his efforts to raise the money, fell in with usurious friends, which fall eventually led to the transactions for which he was indicted in the present case (B of E, 34-37).

Relying solely on the legal consequences of the references in the opening statements (B of E, 357-358; 367-368),[7] the trial court allowed an extensive cross-examination of Appellant directed to his association with King Adjustment Company (B of E, 356-370) including the following colloquy:

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[6] The trial court referred to "what the statute says you may do" under an indictment (B of E, 119). Undoubtedly, "the statute" intended was the so-called similar acts statute, Ohio Revised Code Section 2945.59, (Appendix 57-58).

[7] The Appellant's evidence in his defense contains no reference to King Adjustment Company. Therefore, the scope of direct examination gave no occasion for the interrogation covering King Adjustment Company.

Q. I will repeat the question. The only thing you were handling for your clients, physical thing, was money you collected on their behalf and held in trust for them; is that right?

Mr. Smith: Objection.

The Court: Objection overruled.

A. Yes, sir.

Q. Now, in view of that, are you telling these people, will you tell these people, in view of that, how this collection agency could go $20,000.00 in debt? (B of E, 366).

Following this, although the record contains no evidence of arrest or conviction involving Appellant and King Adjustment Company nor for that matter, of any other arrest or conviction of Appellant, the Prosecutor was allowed to argue that Appellant had embezzled King funds.

Thus on final argument the state characterized Appellant's affairs with the King Adjustment Company:

> Why would it be necessary for Mr. Stickler, if he wanted to borrow money, why would it be necessary for him to give this tremendous story about the contractors. * * * *You don't have to do something which isn't necessary. He gave them the story because he knew very well that if he went to them and said, "Mr. Steffen, you don't know me, I don't know you, but the fact of the matter is a few years ago I had a collection agency and I embezzled money and I need some cash. Are you willing to give it to me?"* What is a man going to say if he has any common sense at all? "Why, do you think I am crazy? *You took somebody's money once, you are not going to take mine."* (Emphasis supplied.) (B of E, 427-428.)

Counsel's objection to the embezzlement argument was overruled (B of E, 428).

7. During the trial of the Appellant, witness Pat Sestito testified that he did not meet Appellant for the

purposes of transacting business[8] on the advice of one Shott and further questioning along this line was cut off (B of E, 216-218). In a subsequent trial in which Shott was defendant, the same witness admitted having said that he had "nothing against Ed Shott except it was through him (he) heard about Stickler" (Tr. I, 139-140).[9]

8. In addition to those actions of the trial court already described, that court took the following actions pertinent to issues in this appeal:

(a) The court mis-stated the prior testimony of complaining witness Steffens in the presence of the jury suggesting that the witness had testified that he shared the profits of Appellant's lending operations (B of E, 74) although the witness had made no such claim and did not confirm the court's inaccurate recollection of the testimony. Counsel's objection and motion for a mistrial were overruled (B of E, 74-75). Only much later in his testimony did the witness affirm the "sharing" and then only on being pressed by the court (B of E, 104). Later, however, he confirmed that he was looking only to Appellant for his money (B of E, 104) and that Appellant had never suggested deals on a shared basis (B of E, 105);

(b) The court repeatedly characterized the transactions as investments (p. e., B of E, 186; cf. 189; 195).

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[8] State's Exhibits 15-20, attached to the Bill of Exceptions and admitted over Appellant's objection (B of E, 204-205; 207; 297-298), were notes and checks demonstrating Appellant's transaction with the witness admitted under the similar acts statute (Ohio Revised Code, Section 2945.59). See charge of the trial court (B of E, 457). Appellant's trial counsel objected to every State exhibit and opposed each admission (B of E, 295-300).

[9] This seemingly minor point acquires its measure of importance from the fact that non-public "sales" of notes are exempt (see Ohio Revised Code, Section 1707.02[G], Appendix 55).

(c) The court allowed the prosecutor, in his opening statement, to discuss Appellant's association with King Adjustment Company and his placing of $49,000.00 in that company. This was accomplished by the porsecutor's speculation as to why the company was short and why it was necessary for the Appellant to pay in the money (B of E, 23). In addition, the prosecutor was permitted to discuss the richness of Appellant's office (B of E, 22), his "secret life," the desperation of his creditors, suicide possibilities among those who had been investors, Appellant's high life, and finally, to characterize Appellant as "a fraud" (B of E, 29). Upon objection that such matters were irrelevant and prejudicial, the record reveals only that the trial court observed enigmatically:

"The last few statements" (B of E, 29).

Whereupon the prosecutor concluded by references to misrepresentations respecting non-existent deals by the Appellant and a declaration that he was selling "just a lot of feet of empty blue sky" (B of E, 29).

(d) The court, after instructing the jury to disregard that portion of the prosecution's summation which characterized Appellant as "a man who has brought ruin and incalculable ruin to many people in this community" and "disgrace and discredit to his profession" (B of E, 409), then permitted the state to argue that Appellant had the burden of proof with respect to an essential element of the crime[10] (B of E, 424-425), that Appellant had "many brokers out working for him" (B of E, 425, 426), had misrepresented his relations with contractors to swing loans (B of E, 427-428), lived elegantly, and officed

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[10] The statutes under which Appellant was convicted place the same burden on him (Ohio Revised Code, Section 1707.45, Appendix 57). See paragraph 4, Statement of the Case, page 16 *supra*.

splendidly (B of E, 428-429). The trial court also allowed the prosecutor to imply that Appellant managed it all by concealing from his debtors that a few years before he embezzled money from his collection agency (B of E, 427-428).[11] In addition, the state was allowed to sum up losses allegedly suffered by other lenders in addition to that one whose transactions with the Appellant were the subject of indictment and to finish with a flurry of characterizations of Appellant's borrowing operations. Appellant was, the prosecutor said, selling blue sky, patting "you on the back with one hand" and picking "your pocket with the other" (B of E, 432).

9. The trial court:

(a) charged the jury that promissory notes, not representing an interest in profits, are exempted under the applicable statute, if such notes are:

> "* * * sold in a bona fide way; that is, in good faith in the ordinary course of legitimate business or borrowing." (B of E, 449).

But that promissory notes are non-exempt:

> "* * * if they are offered directly or indirectly to the public; that is, if they are open to common or general participation of any person as distinguished from an offer to particular persons made in good faith in the ordinary course of legitimate business or borrowing." (B of E, 449).

The section of the code being interpreted by the court (Ohio Revised Code, Section 1707.02[G]) provides only:

> "Commercial paper and promissory notes are exempt when they are not offered directly or indirectly for sale to the public."

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[11] Objection to the embezzlement argument was overruled (B of E, 428).

Ohio Revised Code, Section 1707.44(B) provides in pertinent part:

> "No person shall knowingly make * * * any false representation concerning a material or relevant fact, in any oral statement * * * for any of the following purposes:
>
> * * * (4) Selling any securities in this state."

Appellant was indicted (1) for selling a security without a license (two counts), and (2) selling an unregistered security (two counts) and nothing else (Tr. II, Indictment, 14-15).

(b) charged the jury that each of the promissory notes involved here might be a security,

> 2. Even though, in form and also in substance, the instrument was a promissory note *and not representing an interest in profits*, if it was of a character which was open to common or general participation by any person, then it is a promissory note which was offered to the public. (Emphasis supplied.) (B of E, 445.)

and in connection with Ohio Revised Code, Section 1707.-02(G) that

> * * * even though this note doesn't represent an interest in profits, and if it is only a promissory note, nevertheless, a promissory note, in and of itself, may be prohibited by this security statute; and that is if it is sold to the public. (B of E, 448-449; 450; see also 455).

The statute itself, Ohio Revised Code, Section 1707.01(B), defines a security:

> "Security" means any certificate or instrument which represents title to or interest in, or is secured by any lien or charge upon, the capital, assets, profits, property, or credit of any person or of any public or

governmental body, subdivision, or agency. It includes * * * promissory notes, * * * (Appendix 54).

(c) charged the jury that Ohio Revised Code, Section 1707.45 puts the burden of proving the non-public nature of the alleged securities upon the defendant (Appellant here)[12] by a preponderance or greater weight of the evidence (B of E, 449-450).

(d) charged the jury that the fact that Appellant thought an instrument he gave complaining witness Steffen was "merely a promise to repay a loan" and did not know it was, nor intended it to be, a security, was immaterial to that instrument's status as a security (B of E, 443). However, Ohio Revised Code, Section 1707.44(c) prohibits "knowing" and intentional sales. The Appellant testified with respect to the transactions (B of E, 323-325):

> Q. When you arrived at Mr. Steffen's home, what was said and what occurred?
>
> A. * * * Mr. Steffen then told me that he had $10,000.00 available which I could borrow. He said that $5,000.00 of it was in his bank account, and there was another $5,000.00 which he had due him from Ed Shott that very day, which was January the 3rd, 1961, and which he would procure from Mr. Shott the next day. He told me that if I wanted to borrow the $5,000.00 that he had in the bank, that he would let me borrow it on the basis of 60 days at 20 per cent, or a thousand dollars for the use of his money for a 60-day period.
>
> * * * * *
>
> Q. Mr. Stickler, did you ever knowingly or intentionally sell anything to Mr. Steffen?

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[12] Appellant does not contest the fact that the statute so provides (see Appendix 57). His objection with respect to the burden of proof reaches both the statute and the charge (see Questions Presented, #4).

A. I never sold Mr. Steffen anything. Mr. Steffen made a personal loan to me, and I in return promised to repay at a definite time a fixed amount of principal, which he had loaned me, together with an additional amount which was also fixed for the use of his money, which was interest, and this money was to be paid from my own personal account. It was not conditioned upon anything else. If I had died the next day, it would have had to be paid from my personal account. It was a fixed amount, a sum certain.

Steffen testified he was always to receive a fixed sum in return for use of his money (B of E, 91-92), that the notes in issue in the indictment were never offered to anyone else (B of E, 102), conceded he was not told he would share in profits (B of E, 104, 105), and that for the money given Appellant he looked only to Appellant for repayment (B of E, 104).

(e) charged the jury that an investment:

* * * is the entrustment of money, or other property, to another person, with the expectation of deriving a profit or income through the efforts and management of a person, or persons, other than the person who advances the money, in this case, through the efforts and management of Leslie Stickler in making loans at high rates of interest to builders, and so forth, and not by any efforts and management of Robert Steffen. *If you find that the State has proved beyond a reasonable doubt that such representations were made to Robert Steffen by the defendant Leslie Stickler, either directly or indirectly, and such representations induced and caused Steffen to advance the money and accept the notes, then each of said notes is a security* within that part of the definition of law with regard to profits, and that it is not exempt from the provision of the law requiring licensing and registration. (Emphasis supplied) (B of E, 445-446; see also 455-456.)

See the statutory definition in Ohio Revised Code, Section 1707.01(B) at (b) *infra*. The complaining witness for the State disavowed any representation about, or expectation of profit sharing (B of E, 91, 92, 104, 105).

(f) charged the jury that:

> * * * since the essential elements of the offenses charged with reference to each of the two instruments are the same, I will summarize these elements as follows:
>
> 1. That the offense, if any, was committed in Hamilton County and State of Ohio.
>
> 2. That each of the instruments marked Exhibit 3 and 4 was a security which was not exempt; that is, one which might be sold without complying with the requirements of licensing and registration.
>
> 3. That the Defendant sold, or caused to be sold, said instruments to Robert Steffen on January 3, 1961.
>
> 4. That the Defendant did not have the required license at the time of the sale of either instrument.
>
> 5. That neither of said instruments, at the time of the sale, was registered. (B of E, 441).

and in connection with the State's proof, that:

> * * * I will take up each of these elements and instruct you as to what rules of law you must follow in determining whether a particular element and, therefore, all of the elements, have been proved by the State beyond a reasonable doubt.
>
> 1. It is undisputed that the transaction alleged to constitute the offense, if any, took place in Hamilton County and the State of Ohio. So you must assume that that, which is called the venue or the place where it took place, has been proved.
>
> As to elements four and five; that is, whether the Defendant was licensed and whether the instruments were registered, there was offered in evidence Exhibits

1 and 2, which a representative of the Department of Securities offered. This was a certificate to the effect that there is no record of such a license to the Defendant, and no record of a registration of either of these instruments. The law says that such a certificate is prima facie proof of the facts and is sufficient to prove those facts, unless overcome by evidence to the contrary. There is no such evidence in this case to the contrary; in fact, the Defendant testified that he had not obtained such a license and had not registered either of the instruments. Therefore, you may assume that these two elements have been proved beyond a reasonable doubt; namely, that he did not have the required license, and he had not made the required registration.

The other element is that he unlawfully, knowingly and intentionally sold each of these instruments to Robert Steffen. The meaning of the word "sell" in connection with the sale of securities is defined by the security law, Section 1707.01, sub-section "C," as follows:

The term "sale" is as applied or accepted in Courts of Law or Equity, and includes every disposition or attempt to dispose of a security or an interest in a security. The definition of a sale which shall be accepted in Courts of Law is this:

A transfer of title to property or an interest in property for a consideration called a price. However, that there may be no doubt in this case of what is meant by a sale, the statute further provides, as you will note, as part of the definition, that a sale of securities is also every disposition or attempt to dispose of the security or an interest therein.

The term disposition as here used means an intentional delivery of the instrument to Robert Steffen in such a manner as to transfer title to the instrument to him, and all the rights created by the instrument, with full knowledge that he was making such a transfer. That is the meaning of the word "disposition."

It is a little broader than the ordinary definition of a sale which I read to you.

The State has offered evidence of such a transfer. There is no evidence to the contrary. In fact, the Defendant, Mr. Stickler, testified that he knowingly and intentionally made such a transfer on that date to Robert Steffen, claiming, however, that he believed and intended the instrument to be merely a promise to repay a loan. The fact that he did not know that it was a security, and did not intend it to be such, is immaterial if, in fact and in law, it is a security. Every person is presumed to know the law. Ignorance that the act committed is a crime is no excuse. Since there is no evidence contrary to the evidence that the Defendant made such a disposition of each of these instruments, and he has admitted that he did so, you must assume that the State has proved beyond a reasonable doubt that the Defendant did sell each of these instruments *as he is charged in the indictment.* (Emphasis supplied.) (B of E, 441-444.)

The record is barren of evidence that the notes in issue were not exempt because of their public nature. For the complaining witness conceded the notes (B of E, State's Exhibits 3 and 4) were made in his livingroom, handed to him (B of E, 57) and offered to no one else (B of E, 102).

(g) charged the jury that:

In any criminal case in which the motive or intent of the Defendant or his scheme, plan or system of doing an act is material, any similar acts which aid to show his motive or intent, or his scheme, plan or system of doing the acts, may be proved, whether contemporaneously with, prior to or subsequent to, notwithstanding that such evidence may show or tend to show the commission of any crime for which the Defendant is not on trial.

You are not concerned with determining whether any of these other transactions was a crime. Your concern is only with the crime charged in the indictment; namely, the dealing with Steffen on these two instruments. The only purpose of said evidence as to other transactions was to help you to determine the motive and intent and purpose of the act of borrowing money from Robert Steffen by the Defendant, and the real character and purpose of these two promissory notes for $6,000.00, with interest on the $6,000.00 at the legal rate of six per cent. (B of E, 447-448.)

* * * * *

In determining whether the Defendant has proved by a preponderance of the evidence that these two instruments were not a part of a series of similar instruments offered directly or indirectly to the public, you may consider the evidence of similar transactions, which I referred to before as having been put in evidence and which the Court admitted under the rule of law which the Court read to you. If you find that the State has proved beyond a reasonable doubt, as the Court has defined that term to you, that both of these instruments were securities, either because (1), they represent an interest in profits; or (2) because, although representing only promissory notes and not an interest in profits, they were offered directly or indirectly to the public, then your verdict must find the Defendant guilty on all four charges or counts in the indictment. (B of E, 450.)

* * * * *

In determining whether the Defendant has proved by a preponderance of the evidence that these two instruments were not a part of a series of similar instruments offered directly or indirectly to the public, you may consider the evidence of similar transactions, which I referred to before as having been put in evidence and which the Court admitted under the rule of law which the Court read to you. (B of E, 459-460.)

Much of the evidence as to other notes substantially paralleled that of Steffen. That is, the recipients of notes looked only to Appellant for payment and in fixed amounts (B of E, 140-141, 149; 189-190; 215-216; 234-235; 248-249; 251; 273, 280-281).

(h) charged the jury that:

> The state has offered evidence that on January 3, 1961, Robert Steffen advanced $5,000.00 on each of these instruments, and at that time the Defendant represented that said $5,000.00 would be repaid, together with a portion of the profits which the Defendant would earn by loaning money at high rates of interest to builders and others; that is, that it was represented to be an investment in the profits of the business of loaning money by the Defendant. (B of E, 445.)

There was no testimony that the money borrowed by Appellant in return for the notes *in issue* represented an investment in profits. Indeed, Steffen testified to the contrary—that he "looked" only to Appellant for a sum certain in return for the use of his money (B of E, 104-105).

10. Without success trial counsel for Appellant objected to the admission of all the State's Exhibits (B of E, 46, 295-300) moved for a directed verdict at the end of the State's case (B of E, 303), at the end of the whole case (B of E, 388), and took a general exception to the charge (B of E, 452).

POST TRIAL.

1. Appellant filed a timely motion for a new trial (Tr. II, 64) which was overruled (Tr. I, 27).

2. The allowed *voir dire* was omitted from the record (B of E, 9, 16) and was not included when the trial court granted (Tr. II, 60) the Appellant's request for a free bill

as provided in Ohio Revised Code Section 2953.03 (Appendix 58). The uses which the transcript of the *voir dire* (see Folios A and B) might have served on appeal is apparent from the resumé in the Appendix at p. 60.[13]

THE QUESTIONS ARE SUBSTANTIAL.

1, 2,[14] LACK OF STANDARDS.

Criminal statutes lacking the certainty which will inform men of ordinary intelligence what conduct is prohibited suffer a constitutional frailty. If such statutes do not inform those to whom they are addressed, they are void for vagueness. *Connally v. General Construction Co.*, 269 U. S. 385, 391-392 (1926); *Screws v. United States*, 325 U. S. 91, 101 (1945); *Lanzetta v. New Jersey*, 306 U. S. 451, 453 (1939); *Cline v. Frink Dairy Co.*, 274 U. S. 445, 458 (1927); *United States v. Cohen Grocery Co.*, 255 U. S. 81, 89-91 (1921); cf. *Winters v. New York*, 333 U. S. 507, 509 (1948); *Herndon v. Lowry*, 301 U. S. 242, 261 (1937). See *United States v. Capital Transit Co.*, 34 App. D. C. 592, 598 (1910) where it is aptly said:

> * * * the dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain founda-

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[13] The additional soaking in publicity coupled with the earlier exposure obviously made the need for reinterrogation more urgent.

[14] These two (2) questions are considered together because they have a substantial relationship to the same infirmity. For the most part, citations to sources of factual matters hereafter, will include only references to the Appendix or to the Statement of the Case. Those sources refer to the record where relevant.

> tion. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon one conception of its requirements and the courts upon another.

Another aspect of the lack of standards and vagueness problem is the scope that such statutes may afford prosecutors and judges in imposing criminality. Too much latitude may create a constitutional fault. See Packer, *Mens Rea and the Supreme Court*, the Supreme Court Review (1962), 107, 124. This Court's approach to the problem has been pitched, sometimes, in terms of notice, cf. Mr. Justice Douglas's opinion, in which three justices concurred and a fourth concurred in result, in *Screws v. United States, supra*, 101-104 and see *Lambert v. California*, 355 U. S. 225, 228-230 (1957) where the requirements were quite specific but lack of proof of knowledge or probability of knowledge, *ibid.*, 229-230 resulted in a reversal of a conviction. The requirement of intent or willfulness may be sufficient to meet the challenge of vagueness, see *United States v. National Dairy Products Corp.*, 372 U. S. 29, 35 (1963) and courts sometimes attribute intent to save a statute, cf. *Screws v. United States, supra*, 103-104. Mere omission of any mention of intent does not necessarily eliminate it as an element, cf. *Morissetti v. Williams*, 342 U. S. 246, 263 (1952). But the presence of that factor does not necessarily cure a statute where the condemned act remains uncertain, *United States v. Cohen Grocery Co., supra*, 89-93. An exception may itself introduce the uncertain element mounting a

constitutional fault, *Cline v. Frink Dairy Co., supra*, 456-458. The charge to the jury can be the vehicle of fault, even though no exception is taken, if the charge does not properly cover the essential intent or bad purpose, cf. *Screws v. United States, ibid.*, 101, 107.

One section of the statute under which Appellant stands indicted included "knowing" and "intentional" elements (Ohio Revised Code, Section 1707.44[C], Appendix 57) but another did not (Ohio Revised Code, Section 1707.44[A], Appendix 56).

The exemption for promissory notes of a non-public nature (Ohio Revised Code, Section 1707.02[G], Appendix 55) introduced an element of uncertainty into both sections. There was no definition of "public" or "non-public" in the statute. The Appellant had to guess whether a promissory note was public or not and therefore exempt. "Public" is at least as uncertain in its meaning as "gang," see *Lanzetta v. New Jersey, supra*, 457-458 (1939). And the problem of uncertainty is compounded where the activity, here a personal loan, is close to the periphery of the statutory prohibition, and does not afford the "warning" constitutionally required, cf. *United States v. National Dairy Corp., supra*, 32-33 (1963).

Had Appellant been widely read in the commentaries dealing with the legislative purpose in enacting the exemption in the Ohio Securities Act, he could not have known the conduct complained of here was proscribed, see Harper, *Protection of Investors under the Ohio Securities Act*, 23 Univ. Cinn. L. Rev. 418, 426, cf. 429 (1954); Boesel, *Analysis of the Ohio Securities Act*, 5 West. Res. L. Rev. 352, 359 (1954); Nida, *The Ohio Division of Securities and the Ohio Securities Act*, 13 Ohio St. L. J. 427, 433 *et seq.* (1952). The leading Ohio case involving "public" promis-

sory notes, *State v. Weger*, 25 Ohio L. Abs. 49 (1937), *app. dismd.* 133 Ohio St. 23 (1937) was no better guide.[15]

Here, too, the court's charge invaded the Appellant's rights by directing the jury that Appellant admitted the acts (B of E, 442; see Statement of the Case, *supra*, page 27) but that his testimony that he neither knew nor intended a note to be a security was immaterial. (See Statement of the Case, B of E, 443; *supra*, p. 23). In effect, the court took the intent issue away from the jury. This was the one remaining element that might have tended to cure the lack of standards.

In light of these circumstances, Appellant was tried under arbitrary, unreasonable and oppressive standards depriving him of due process of law and subjecting him to exposure to criminal penalties for conduct which no man of ordinary intelligence could predict was proscribed by the statute. In both of these particulars he was the victim of an invidious discrimination, not endured by other persons charged with crime, contrary to the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Whether Ohio Revised Code, Sections 1707.02[G] and 1707.44[A] and [C], on its face, and as applied in this instance, is void for a lack of standards sufficient to apprise the Appellant of the prohibited conduct, raises sub-

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[15] Weger was convicted under the statute predecessor to Ohio Revised Code, Sections 1707.01-1707.45. Prohibited from selling unregistered stock, he signed a series of notes in blank, made up in pads and bearing a notation indicating the shares the lender was to have in the company when the enterprise reached completion or production or "profit paying." Return was to be based on the ratio which the "loan" of the individual investor bore to the whole sum invested. Some $300,000.00 was raised in this fashion. Authority was conferred on an associate to issue the notes "to anybody that came in and put their money down." The court thought the public aspect of Weger's transactions obvious.

stantial questions warranting this court in noting probable jurisdiction on the basis of questions 1 and 2.

3. EFFECTIVE RIGHT TO COUNSEL; OPPORTUNITY TO PREPARE.

It has long been settled that effective right to counsel is essential to due process. *Powell v. Alabama*, 287 U. S. 45 (1932). Recent decisions of this court have further delineated the scope of the right, *Gideon v. Wainwright*, 372 U. S. 335 (1963); *Douglas v. California*, 372 U. S. 353 (1963).

It is not just the presence of the lawyer which satisfies constitutional requirements. The lawyer's chance to do his work is the root condition for effective counsel. And this includes the right to time for adequate preparation. *Powell v. Alabama, supra*, 56-59; *Jones v. Kentucky*, 97 F. 2d 335 (6th Cir., 1938); cf. *Avery v. Alabama*, 308 U. S. 444, 446, 447-453 (1940) where, although a motion for continuance had been denied by the trial court, and this court affirmed the defendant's conviction, the due process aspect of time to prepare was plainly stated. Moreover, the court made a scrupulous, independent examination of the state court record to determine that due process had been afforded the defendant.

In the present case, the "time to prepare" issue has some unique aspects. Here the Appellant was under fifteen pending indictments in the state court, was under federal indictment, had his records impounded by the federal district court and, therefore, was limited in his ability to defend or aid in his defense, was awaiting rulings on preliminary motions, and, upon short notice, was advised that this particular indictment would be on for trial. In addition, his trial counsel was heavily involved in litiga-

tion in the same common pleas court. (See Statement of the Case, *supra*, p. 11.)

These circumstances pose the question of effective right to counsel in a new and special aspect warranting this court in granting the writ of certiorari on the basis of Question 3 to determine whether this Appellant was afforded due process.

4. BURDEN OF PROOF.

The validity of a statutory presumption depends upon its rational nexus with a proven fact. The consequence being that the proven fact raises the presumption by inference. Thus a statute creating a presumption that is arbitrary, vague, or that "operates to deny a fair opportunity to repel it" violates the due process clause of the Fourteenth Amendment, *Manley v. Georgia*, 279 U. S. 1, 6 (1929); *Tot v. United States*, 319 U. S. 463, 466-468 (1943). Another view supported by a persuasive concurrence in this Court suggests that a statute is constitutionally infirm which puts a presumption in place of the state's proof of an "essential ingredient" of an offense (see Mr. Justice Black, with whom Mr. Justice Douglas concurs, concurring in *Tot v. United States, ibid.*, 473. Cf. also the dissent in *Leland v. Oregon*, 343 U. S. 790, 803-804 [1952]).

One test of the validity of a presumption is the balance of convenience in producing the evidence, see *Morrison v. California*, 291 U. S. 82, 88-90 (1934) but this is a mere corollary to the test of rational connection, *Tot v. United States, ibid.*, 467. A legislature may not "declare an individual guilty or presumptively guilty of crime, *Morrison v. California, ibid.*, 90.

In the present case, the statute (Ohio Revised Code Section 1707.45, Appendix 57) does not raise a pre-

sumption in terms. Rather it shifts the burden of proof and accomplishes a presumption obliquely by specifically allocating the burden for proving exceptions to those who claim such exception. For example, Ohio Revised Code Section 1707.02(G) (Appendix 55) exempts non-public sales of promissory notes. Coupled with the burden of proof statute, this means that this Appellant must prove the non-public nature of his note transfers if he is to take advantage of the exemption. In effect, this both requires him to prove an essential element of the crime and rebut an irrational presumption. For since the utilization of the exemption shifts the burden to him without the state offering any facts to show the public nature of the transaction,[16] the exemption amounts to an expanded definition of "securities" which comes into play simply by showing the transaction without more. Thus, in effect, the burden of proof statute requires Appellant to rebut the presumption that his transaction was public. Since this effect is achieved without facts of any kind relating to public status "presumption" cannot be qualified for due process purposes under a theory of "rational connection." *There is no proven fact* to which the presumption of public status can be connected.

Nor can the presumption be based on the bare sale. For there is nothing about a mere note transaction per se which *rationally* raises the inference that the transaction is public. The presumption here is not like those arising logically from the mere possession of contraband items such as opium, *Yee Hem v. United States*, 268 U. S. 178, 184 (1925); policy slips, *Adams v. New York*, 192 U. S.

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[16] The trial court conceded the state had made no proof of the public nature of the transactions for which the present Appellant was indicted (B of E, 119). Had the Appellant not taken the stand on this and other issues, the Ohio law would allow the prosecution to comment on the omission.

585, 599 (1904); or apparatus for distilling spirits, *Hawes v. Georgia*, 258 U. S. 1, 4-5 (1922).

The balance of convenience argument has no application here. The facts of the note transaction are as available to the state through the complaining witness as they are to the Appellant. It cannot be said that shifting the burden to the Appellant will aid the "accuser without subjecting the accused to hardship or oppression," *Morrison v. California, supra*, 89.

If the statute in issue here did not provide an exemption for private note transactions, it would be unreasonable and for that reason constitutionally vulnerable. To save it from unreason with the exemption and put unreason back into the law through the device of an unreasonable, irrational shifting of the burden of proof provides a classic example of an unconstitutional application. Both the due process and equal protection clauses are offended when an unreasonable application subjects a defendant to burdens not imposed upon other persons accused of crime.

> Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the fact-finder of his guilt. * * * *Speiser v. Randall*, 357 U. S. 513, 526 (1958)

The burden of proof problem in question 4 raises a substantial constitutional issue under the Fourteenth Amendment warranting this Court in noting probable jurisdiction.

5. PUBLICITY AFFECTING THE TRIAL.

A fair hearing is fundamental to due process, *In Re Murchison*, 349 U. S. 133, 136 (1955); *In Re Oliver*, 333 U. S. 257, 266 et seq. (1948); *Tumey v. Ohio*, 273 U. S. 510 (1927).

A community inflamed by publicity may so infect the potential jurors that minimal standards of impartiality are impossible, *Shepherd v. Florida*, 341 U. S. 50, 52-55 (1951); see also *Irvin v. Dowd*, 366 U. S. 717, 725-728 (1961), where the "buildup of prejudice (was) clear and convincing"; *Rideau v. Louisiana*, 10 L. Ed. 2d 663, 665 (1963).

And few propositions are clearer than this:

> Proceedings for the determination of guilt or innocence in open court before a jury are not in competition with any other means for establishing the charge, Frankfurter, J. in *Maryland v. Baltimore Radio Show*, 338 U. S. 912, 920 (1950) (Opinion on denial of the petition for writ of certiorari) cf. *Griffin v. United States*, 295 F. 437, 438-441 (3rd Cir. 1924).

This Court has found such intrusion implicit in the community circumstances "without pausing to examine a particularized transcript of the *voir dire* examination," *Rideau v. Louisiana, ibid.*, 666. And under less flamboyant conditions in *Meyer v. Cadwalader*, 49 F. 32, 36 (Cir. Ct. E. D. Pa., 1891) a federal court found "good ground" for setting aside a verdict without direct evidence to show that a jury read newspaper articles calculated to prejudice the jury against the plaintiffs in a civil case. The publication in a newspaper of a post office fraud order while a defendant was on trial was held to make a fair trial impossible, *Harrison v. United States*, 200 F. 662, 669 (6th Cir., 1912). Nor is the issue of juror impartiality in the face of publicity necessarily resolved because a prospective juror meets state law standards by affirming his ability to render an impartial verdict. This Court will still essay an independent evaluation of the *voir dire*, *Irvin v. Dowd*, *supra*, 723 et seq.

In the trial in the present case the news media's treatment of this Appellant's problems before and during trial was raised early and late by a series of motions (see Statement of the Case, *supra*, pp. 10-14) and when during the course of the proceeding it was implied on a television program that he might be responsible for the disappearance of a defendant similarly indicted, the trial refused to view or listen to the tape offered by trial counsel (B of E, 13, Andrews Statement, Appendix 59; see Statement of the Case, *supra*, p. 13), allowed only a limited reinterrogation at the time, and when the absent defendant was found dead to the accompaniment of vast publicity in all media in the large urban area where Appellant's trial was under way, the trial court "instantly" overruled trial counsel's attempt to determine what, if any, influence the new wave of publicity had on the jurors. Thus it is not possible to know to what degree impartiality was removed from the trial. The judge in whose care this important right rested refused to allow the only procedure available to the Appellant to test it. Moreover, he did not *frequently* admonish the jury to disregard and guard against the effects of such publicity, see *United States v. Accardo*, 298 F. 2d 133, 136 (7th Cir., 1962). Instead, he barely admonished it at all (see trial court's Admonitions to Jury, Appendix 66-67).

This case, therefore, presents one of those occasions when, as Mr. Justice Douglas suggested in his dissent in *Beck v. Washington*, 369 U. S. 541, 581 (1962), this Court should hold that the requirements of due process are lacking. That is:

> Whenever unfairness can be shown to infect any part of a criminal proceeding.

Here not only is unfairness suggested by the inordinate and inflammatory publicity given the Appellant during

trial but the presiding judge compounds it by refusing to ventilate the possibility of influence by reinterrogation or to adequately warn against it.

Not even "zealous and earnest counsel," see *Avery v. Alabama*, 308 U. S. 444, 450 (1940) could help Appellant under such conditions. And the prosecution made no effort to show affirmatively that the jurors were not affected, cf. *United States v. Milanovich*, 303 F. 2d 626, 629-630 (4th Cir. 1962).

Exercising its supervisory powers to formulate and apply "proper standards for the enforcement of the criminal law in the federal courts," *Marshall v. United States*, 360 U. S. 310, 313 (1959), this Court has corrected a far less telling departure from standard in the federal court system.

If a more aggravated case is necessary to invoke a comparable guardianship against state action by application of the Fourteenth Amendment, then the present case provides the occasion. The measure of this Court's responsibility in this particular is reason justifying a writ of certiorari. It should be granted as to Question 5.

6. REINTERROGATION OF THE JURY.

The reinterrogation issue presented by Question 6 is closely related to the problem posed by Question 5 with respect to the amount, kind, and dissemination of publicity preceding and attending this Appellant's trial. Without repeating what has been said in the Statement of the Case (pp. 11-14 *et seq., supra*) and under Question 5 in this section, it is clear enough that the circumstances called for reinterrogation both before the introduction of evidence[17]

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[17] On the occasion of the television program in which an attorney for Ruf impliedly placed on the appellant the responsibility for Ruf's disappearance (see Statement of the Case, *supra*, pp. 12-14).

began and again during the trial when the publicity which had been constantly high, surged even higher.[18] The limited questioning allowed in the first instance disclosed three jurors who admitted having seen the telecast. One of them indicated anyone would have been influenced by the program. He was excused. A second could not say whether the telecast influenced him. He thought he might have formed an opinion. Challenge for cause was denied and he was excused by the defense. The third disavowed influence, could not be reached for cause under Ohio law, See Ohio Revised Code, Section 2945.25(B) but cf. *Palmer v. State,* 42 Ohio St. 596 (1885), and was allowed to remain on the jury only because Appellant had exhausted his peremptory challenges (*Résumé of the Voir Dire, etc.* Appendix 60 *et seq.;* see Statement of the Case, *supra,* pp. 12-14).

On the second occasion there was no reinterrogation allowed at all.

Under such circumstances the impartiality of the jury is suspect and, with the suspicion augmented but not even probed in the second instance, the Appellant's conviction is tainted by the lack of a fair trial. Cf. the careful testing on the initial *voir dire* by the trial court described in *United States v. Milanovich,* 303 F. 2d 626, 629 (4th Cir. 1962); also the standards deemed necessary to protect the jury from prejudicial publicity in *United States v. Accardo, supra,* 136; see especially *Coppedge v. United States,* 272 F. 2d 504, 507-508 (D. C. Cir., 1959); *Krogmann v. United States,* 225 F. 2d 220, 228-229 (6th Cir., 1955); *Briggs v. United States,* 221 F. 2d 636, 639 (6th Cir., 1955). The Supreme Court of South Carolina has recently held that to refuse to conduct a requested examination on the bias and

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[18] At this time Ruf's body was found (see Statement of the Case, *supra,* p. 14).

prejudice of prospective jurors violated the right to an impartial jury, *State v. Brown*, 126 S. E. 2d 1, 5 (1962). And in Massachusetts, unless there is an immediate cautionary instruction, adverse publicity in mid-trial justifies an assumption of essential prejudice, *Commonwealth v. Crehan*, 188 N. E. 2d 923, 925-927 (Sup. Jud. Ct. of Mass., 1963). The analogies to the present case are instructive.

This Court has never deviated from its adherence to the proposition that trial before a fair and impartial tribunal is basic to due process. *In re Murchison, supra.* It is only in the application of the principle that divisions appear, see dissenting opinion of Mr. Justice Clark, joined by Mr. Justice Harlan, in *Rideau v. Louisiana, supra*, p. 669. The lack of fairness here is aggravated by the trial courts' obstruction of a test by reinterrogation and its limited, almost non-existent, admonition. Since the trial court's intervention prevented the Appellant from meeting the burden posited by the difficult standard exemplified in the *Rideau* dissent, this is an appropriate case for a unanimous court to grant the writ of certiorari as to Question 6 to determine whether Appellant has been deprived of due process.

7, 9, 10, 13, 14.[19] CONVICTION FOR CRIME NOT CHARGED.

Few propositions command more universal assent than this—due process is denied when a defendant is charged with one crime and convicted of another, cf. *Cole v. Arkansas*, 333 U. S. 196, 201-202 (1948); and *Stirone v. United States*, 361 U. S. 212, 217-219 (1960); *Kovacs v. Cooper* (dissent), 336 U. S. 77, 98-100 (1949); see also *United States v. Pepe*, 198 F. Supp. 226, 229 (D. C. Del. 1961); *United States v. Lippi*, 190 F. Supp. 604 (D. C. Del.

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[19] These five (5) questions are considered together because they have a substantial relation to the same infirmity.

1961). To be charged with one crime and convicted of another is hardly better than being convicted on a charge not made.

This Court had said:

> Conviction on a charge not made would be a sheer denial of due process, *De Jonge v. Oregon*, 299 U. S. 353, 362 (1937).

And this is hardly different from being convicted without evidence, see *Garner v. Louisiana*, 368 U. S. 157 (1961). One may speculate whether such a conviction is not also a violation of equal protection of the law since other defendants' convictions are based on *the* charges, *as framed*, against them. Cf. the analogous reasoning in the separate dissents by Mr. Justice Black and Mr. Justice Douglas in *Beck v. Washington, supra.* And where cross-examination is severely limited prejudicial error may result, *District of Columbia v. Clowans*, 300 U. S. 617 (1937). And if the limitations imposed on cross-examination are prejudicial and coincide with additional errors by a state court, another factor telling for the lack of due process is present.

The charges posited by the indictment and bill of particulars in the present case (see Tr. II, 14-15, 32-33), were transformed as the trial progressed in four particular ways:

(a) The stage was set for in transit reformation when the trial court ruled that the prosecution's proof was not limited by the scope of the indictment (see Statement of Case, *supra*, p. 17).

(b) The trial court admitted evidence under the Ohio "similar acts" statute (see Appendix 57-58). That statute is designed to show motive, intent, the absence of mistake or accident on the defendant's part or his scheme, plan or system in performing a questioned act. Each of the "similar acts" as to which the

state was permitted to adduce evidence included purported misrepresentation and fraud (see (c) next paragraph below) with respect to notes given and loans made by Appellant although he was not indicted for the transactions in question and fraud was the concern of statutes on which Appellant's indictment was not based. In addition each portion of the "similar acts" proof included elements which related to the importation of additional meanings into the exemptions and definitions in the statutes under which Appellant's indictment was brought (see paragraph (d) and (e) below). In each instance cross-examination to expose the nature of the transaction was severely limited (Statement of the Case, *supra*, pp. 15-17).

(c) Although the indictment recited that it was laid under Ohio Revised Code Section 1707.01 to 1707.45 inclusive, it is obvious from the language of the indictment and from the bill of particulars that the substantive sections which the state relied on were Ohio Revised Code Section 1707.44(A) and 1707.44-(C). Nevertheless, the trial court repeatedly, over objection, admitted evidence charging fraud and misrepresentation, and limited the Appellant's cross-examination with respect to the nature of the transactions. (See Statement of the Case, *supra*, pp. 15-17). The prosecution was allowed to argue the misrepresentation point in its summation. (See Statement of the Case, *supra*, pp. 18, 20). Such evidence, i.e., charging or implying misrepresentation and fraud, was admitted with respect to both the note transactions involved in the indictment and those considered "similar acts." (See Statement of the Case, *supra*, pp. 16-17). In effect, this amounted to proof of an

act prohibited by a substantive section of the statute (Ohio Revised Code Section 1707.44(B) Appendix 56) not included in the specific charge of the indictment. (See Tr. II, 14-15.)

(d) The trial court engrafted an additional element onto the exemption provided in Ohio Revised Code Section 1707.02(G). That exemption is quite short. It exempts "commercial paper and promissory notes" from the regulatory scheme "when they are not offered directly or indirectly for sale to the public." The trial court accomplished this by charging that the exemption was available only for "bona fide" sales made in "good faith in the ordinary course of legitimate business or borrowing." (Statement of the Case, *supra*, p. 21).

(e) The trial court charged the jury with respect to the definition of a security and added to the statutory definition in Ohio Revised Code Section 1707.01(B) the proposition that a security, "not representing an interest in profits" (the statutory requirement pertinent to the transactions here was that the note be an "interest in * * * profits," see Statement of the Case, *supra*, pp. 22-23 and Ohio Revised Code, Section 1707.01(B) at Appendix 54), could still be a security if offered to the public. Thus the trial court defined a promissory note, in the alternative, as a security if it represented an "interest in profits" *or* if it was offered to the public. Actually, the definition of a security in Ohio Revised Code Section 1707.01 (B) and the exemption in Section 1707.02(G) make the legislative scheme quite clear—"interest in profits" and "public" offering are not alternatives (see Appendix 54-55) but rather necessary *conjunctive* elements to bring a promissory note within the prohibitions of the enactment.

From the five propositions just discussed it is apparent that the original charges were distorted and transformed by error into new and different charges resulting in conviction for crimes not laid to this Appellant, cf. *Viereck v. United States*, 318 U. S. 236, 243 (1943). And he was, therefore, convicted without due process of law.

These circumstances provide another reason for noting probable jurisdiction. To the degree that the trial court enlarged the statutory definition and exemption, there is yet a further issue. Was the trial court's action *state action* contrary to the constitutional prohibitions against *ex post facto* state legislation? United States Constitution, Art. I, § 10. It is true that this Court has long since ruled that state "action" within the *ex post facto* stricture means "legislative" action not erroneous or inconsistent judicial action, *Frank v. Mangum*, 237 U. S. 309, 344 (1915). But the subsequent cases holding that state court interpretation and application of their respective statutes may result in state action lacking in due process [See *Fiske v. Kansas*, 274 U. S. 380, 382, 386-387 (1927)] cast some shadow on *Frank*. In other contexts, of course, the action of a state court is state action within the meaning of relevant clauses of the United States Constitution, *Shelley v. Kraemer*, 334 U. S. 1, 14-18 (1948); *Johnson v. Virginia*, 373 U. S. 61 (1963), see also *Martin v. Hunters' Lessee*, 1 Wheaton 304, 341-342 (1816). The court need not follow a precedent which has lost its logic or never had any. This Court should note probable jurisdiction or grant the writ of certiorari on the basis of Questions 7, 9, 10, 13 and 14.

8, 12.[20] MISCONDUCT BY THE PROSECUTION.

Fair trial has many aspects. And lack of a fair hearing violates even the minimal standards of due process, *Irvin v. Dowd, supra*, 722. A prosecutor's action may create this deficiency in a variety of ways, see *Napue v. Illinois*, 360 U. S. 264 (1959); *Alcorta v. Texas*, 355 U. S. 28 (1957); *Townsend v. Burke*, 334 U. S. 736 (1948); *Mooney v. Holohan*, 294 U. S. 103 (1935). In the present case the prosecutor, with the trial court's acquiescence, asked questions of the Appellant about a prior business failure and implied a defalcation. (See Statement of the Case, *supra*, pp. 17-18).[21]

On final argument the prosecuting attorney specifically characterized the Appellant as an embezzler in connection with his collection agency, King Adjustment Company (see Statement of the Case, *supra*, p. 18). Less reprehensible conduct during a prosecution argument has resulted in this Court's reversing a federal conviction because of possible prejudice, *Berger v. United States*, 295 U. S. 78, 85-89 (1935); see also *Viereck v. United States*, *supra*, 247-248. This Court should determine whether possible prejudice in a federal court is, under the same circumstances in a state court, tantamount to failure of fair trial and, therefore, of due process in the latter court.

The present case, particularly when coupled with the improper cross-examination described above, presents a substantial question of due process warranting this Court granting the writ of certiorari on the basis of Questions 8 and 12.

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[20] These two questions are considered together because they have a substantial relationship to the same infirmity.

[21] For a discussion of the propriety of questions to character witnesses respecting rumors of defendant's arrest for a crime after he had introduced evidence to support his character—a fact situation carrying far greater justification than the present one—see *Michelson v. United States*, 335 U. S. 469 (1948).

11. PERJURED TESTIMONY.

The knowing use of false testimony by state authorities to secure a conviction violates the due process clause of the Fourteenth Amendment, *Napue v. Illinois, supra; Pyle v. Kansas,* 317 U. S. 213 (1942); cf. *Mooney v. Holohan, supra,* 112-113. That the false testimony "goes only to the credibility of the witness" does not alter the rule, *Napue v. Illinois, supra,* 269; and it has been held a matter of indifference to the due process point that the prosecutor himself was unaware of the perjured testimony so long as other state officials participated in procuring the evidence, *Curran v. Delaware,* 154 F. Supp. 27, 31 *et seq.* (D. Del. 1957), *aff'd* 259 F. 2d 707 (3rd Cir., 1958). Testimony is fungible and taint from perjury can hardly be removed by simply excision without more, cf. *Communist Party v. Control Board,* 351 U. S. 115, 124-125 (1956).

In the present case, the testimony claimed to be perjured was given in a trial subsequent to Appellant's and indicated the witness had met Appellant through Shott, a mutual friend. This had been denied by the witness during Appellant's trial. (See Statement of the Case, *supra,* 18-19.) Appellant does not know whether any state official was aware of these facts before the trial in which the witness was exposed. The fact remains the testimony was used.

On its face this contradiction may seem trivial. Actually it is vital because the testimony relates directly to the public or non-public character of Appellant's promissory note to the witness in return for a loan from him. The point has particular significance when considered in conjunction with the trial court's charge that a promissory note "open to common or general participation by any person" is one offered to the public. (See Statement of

the Case, *supra*, p. 21). The false testimony gains further portent in the light of the charge on the purpose of the similar acts testimony. (See Statement of the Case, *supra*, pages 27-28.). In the latter charge the trial court said:

> In determining whether the Defendant has proved by a preponderance of the evidence that these two instruments were not a part of a series of similar instruments offered directly or indirectly to the public, you may consider the evidence of similar transactions * * *.

The damaging thrust of all of this is its indication of a "public" transaction. Depending, in part at least, on false testimony, its probable adverse effects are obvious.

This question provides an occasion for the grant of the writ of certiorari to further determine the limits to the uses of perjury in the light of the due process clause of the Fourteenth Amendment.

15. INCOMPLETE TRANSCRIPT.

It is now settled that the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution will not allow the benefits of a state appellate system to be denied a convicted defendant in a criminal case solely because he cannot pay for a transcript of the record exemplifying errors in his trial, *Griffin v. Illinois*, 351 U. S. 12, 18 (1956); *Lane v. Brown*, 372 U. S. 477 (1963) and *Eskridge v. Washington Prison Board*, 357 U. S. 214 (1958). See also *Draper v. Washington*, 372 U. S. 487 (1963); cf. *Smith v. Bennett*, 365 U. S. 708 (1961); *Burns v. Ohio*, 360 U. S. 252 (1959).

Ohio Revised Code Section 2953.04 provides that the trial judge in a criminal case "may" order, "in the interest of justice," a bill of exceptions and transcript or either of them at state expense for a criminal defendant. Cf. the

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statute involved in *Eskridge v. Washington Prison Board, supra*, 215.[22]

This Appellant requested a free bill of exceptions by motion. The trial court granted the request but the total *voir dire* was omitted. (See Statement of the Case, *supra*, pp. 29-30.) This omission encompassed the initial *voir dire* as well as the limited re-interrogation allowed thereafter. (See discussion under Question 6, *supra*.) Thus errors demonstrated by the jurors' answers to questions could not be demonstrated on appeal for "the materials before the State Supreme Court * * * did not constitute a 'record of sufficient completeness,'" *Draper v. Washington*, *supra*, 497. What that record would have shown can be demonstrated to this Court with certainty for on the 15th day of October, 1963, the trial judge "certified" the omission (Appendix 59) and the court reporter provided under his certificate the verbatim transcript of the *voir dire*. (Folios A and B; see especially that part of the *voir dire* summarized in the Appendix at 60-66.)

These circumstances raise a substantial federal question respecting the availability of due process and equal protection to this Appellant and warrant the court in granting the writ of certiorari as to Question 15.

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[22] The only Ohio case found by Appellant dealing with the right to a transcript on demand within appeal time was decided under Section 2953.03 before an amendment to provide discretion for the trial court. That case, *State v. Trunzo*, 75 Ohio L. Abs. 187 (App. Cuy. Cty. 1956), held that a convicted defendant was not entitled to a free bill of exceptions for use on his appeal.

16. THE ACCUMULATION OF ERRORS.

Without repeating the details of the errors which Appellant contends by themselves infuse his conviction with constitutional frailties, it is urged now that without regard to single depredations of his rights, the accumulation of errors pushes this conviction below the standard acceptable in the light of the imperatives of the Fourteenth Amendment. Thus this court has said:

> Asserted denial [i.e. of due process] is to be tested by an appraisal of the totality of facts in a given case. *Betts v. Brady*, 316 U. S. 455, 462 (1942), overruled on other grounds, 372 U. S. 335, 339 (1963). [Bracketed material supplied.]

Cf. the opinion of Judge Jerome Frank writing for a unanimous Second Circuit Court of Appeals although in a context not related to constitutional questions:

> Although perhaps no one of the errors standing alone would call for reversal in their totality they do. *Ryan v. United Parcel Service*, 205 F. 2d 362, 365 (Cir. 2, 1953).

This Court has measured this question, *Betts v. Brady, supra*, and *Stroble v. California*, 343 U. S. 181, 196-197 (1952) but, so far as Appellant has been able to determine, has never fitted it to an exact ruling. The abundance of error here provides a substantial federal question whether, should the individual errors be of insufficient consequence to support a reversal on constitutional grounds, the totality of error so debilitates essential fairness as to violate due process.

The court should grant the writ of certiorari on this ground.

CONCLUSION.

This Court should note probable jurisdiction as to Questions 1, 2, 4, 7, 9, 10, 13 and 14 and grant the writ of certiorari with respect to 3, 5, 6, 8, 11, 12, 15 and 16. In the alternative, the grant of the writ of certiorari is appropriate for all the questions.

Respectfully submitted,

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Of Counsel.

APPENDIX.

ORDER AND SENTENCE OF THE COURT OF COMMON PLEAS OF HAMILTON COUNTY, OHIO, CRIMINAL NO. 79049.

Enter Weber 8/11/61
(Handwritten)

The Defendant herein having been convicted of Violating Section 1707.44 Ohio Revised Code, as charged in the 1st, 2nd, 3rd and 4th Count of the Indictment, was this day brought before the Court and being informed of the Verdict of the Jury, was inquired of if he had anything to say why Judgment should not be pronounced against him and having nothing further to say then he hath already said.

It is therefore Ordered and Adjudged by the Court that the defendant be imprisoned and confined in the Ohio State Penitentiary at Columbus, Ohio, and kept at hard labor but without any solitary confinement for a period of not less than one Year, nor more than Five Years, in each count, and that he pay the costs of this prosecution for which execution is awarded.

It is further Ordered by the Court that these sentences run concurrently. (Tr. II, 65.)

JUDGMENT OF AFFIRMANCE OF THE COURT OF APPEALS OF HAMILTON COUNTY, OHIO, APPEAL NO. 9032.

This cause came on for hearing upon the appeal on questions of law, assignments of error, bill of exceptions, the transcript and the original papers and pleadings from the Court of Common Pleas of Hamilton County, Ohio, and was argued by counsel, on consideration whereof the Court finds there is no error apparent on the record in

said proceedings and judgment prejudicial to the appellant.

It is therefore considered by the Court that the judgment of the Court of Common Pleas be, and the same is hereby, affirmed, and that the appellee recover from the appellant his costs herein expended, taxed at $_____.

And the Court, being of the opinion that there was reasonable grounds for this appeal, allows no penalty.

It is further ordered that a special mandate be sent to the Common Pleas Court of Hamilton County, Ohio for execution upon this judgment, to all of which appellant, by his counsel, excepts. (Tr. I, 148-149.)

ENTRY OF THE SUPREME COURT OF OHIO.

(No. 37676—Decided March 20, 1963.)

The appeal as of right herein is dismissed sua sponte for the reason that no debatable constitutional question is involved.

Appeal dismissed.

ZIMMERMAN, MATTHIAS, O'NEILL AND GRIFFITH, JJ., concur. (Tr. I, 181.)

RELEVANT SECTIONS OF THE OHIO REVISED CODE.

§ 1707.01 Definitions.

As used in sections 1707.01 to 1707.45, inclusive, of the Revised Code: * * *

(B) "Security" means any certificate or instrument which represents title to or interest in, or is secured by any lien or charge upon, the capital, assets, profits, property, or credit of any person or of any public or governmental body, subdivision, or agency. It includes * * * promissory notes, * * *

(C) (1) "Sale" has the full meaning of "sale" as applied by or accepted in courts of law or equity, and includes every disposition, or attempt to dispose, of a security or of an interest in a security. "Sale" also includes a contract to sell, an exchange, an attempt to sell, an option of sale, a solicitation of a sale, a solicitation of an offer to buy, a subscription, or an offer to sell, directly or indirectly, by agent, circular, pamphlet, advertisement, or otherwise.

(2) "Sell" means any act by which a sale is made.

* * * * *

(E) (1) "Dealer," except as otherwise provided in section 1707.01 to 1707.45, inclusive, of the Revised Code, means every person, other than a salesman who engages or professes to engage, in this state, for either all or part of his time, directly or indirectly, in the business of the sale of securities.

(2) "Licensed dealer" means a dealer licensed under such sections.

§ 1707.02 Exempt securities.

(G) Commercial paper and promissory notes are exempt when they are not offered directly or indirectly for sale to the public.

§ 1707.14 Dealer's license required; exceptions.

(A) No person shall engage in this state in the business of acting as broker for others in the purchase or sale of securities unless such person is licensed as a dealer by the division of securities.

(B) No person shall sell securities within this state or engage in the business of buying, selling, or dealing in securities otherwise than in transactions through or with

a licensed dealer, unless such person is licensed as a dealer by the division, except in the following cases:

* * * * *

(2) When the person is an issuer selling securities issued by it or by its subsidiary, if such securities are specified under division (G) or (I) of section 1707.02, or under section 1707.04, of the Revised Code, or if such issuer is not a dealer under section 1707.06 of the Revised Code; * * *

§ 1707.44. Violations.

(A) No person shall engage in the business of acting as broker for others in the purchase or sale of securities, sell securities, cause them to be sold, offer them for sale, cause them to be offered for sale, or engage in the business of buying, selling, or dealing in securities otherwise than in transactions through or with a licensed dealer, unless the securities are of a kind specified in division (G) or (I) of section 1707.02 of the Revised Code, the transactions are of a kind specified in divisions (B) to (L), inclusive, and (P) and (R), inclusive, of section 1707.03 of the Revised Code, or in section 1707.04 or 1707.06 of the Revised Code, or the transactions are exempt under section 1707.34 of the Revised Code, without being licensed by the division of securities.

(B) No person shall knowingly make or cause to be made any false representation concerning a material and relevant fact, in any oral statement or in any prospectus, circular, description, application, or written statement, for any of the following purposes:

(1) Complying with sections 1707.01 to 1707.45, inclusive, of the Revised Code, in regard to registering securities by description; * * *

(4) Selling any securities in this state.

(C) No person shall knowingly and intentionally sell, cause to be sold, offer for sale, or cause to be offered for sale, any security which comes under any of the following descriptions:

(1) Is not exempt under section 1707.02 of the Revised Code, nor the subject matter of one of the transactions exempted in sections 1707.03, 1707.04, and 1707.34 of the Revised Code, has not been registered by description or qualified, and is not the subject matter of a transaction that has been registered by description; * * *

§ 1707.45 Burden of proof.

In any indictment, complaint, or information under section 1707.44 of the Revised Code, it shall not be necessary to negative the existence of facts which would bring a security within section 1707.02 or 1707.05 of the Revised Code, or would bring a transaction within section 1707.03, 1707.04, or 1707.06 of the Revised Code or to negative existence of facts which would bring a transaction within the exceptions of sections 1707.33 and 1707.34 of the Revised Code. The burden of proof shall be upon the party claiming the benefits of any of such sections.

*§ 2945.59 Proof of defendant's motive.

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* In its charge the trial court (B of E, 447) refers to "Section 2945.04 of the Revised Code of Ohio" and indicates that it "reads as follows: In any criminal case in which the motive or intent of the Defendant or his scheme, plan or system of doing an act is material, any similar acts which aid to show his motive or intent, or his scheme, plan or system of doing the act, may be proved, whether contemporaneously with, prior to or subsequent to, notwithstanding that such evidence may show or tend to show the commission of any crime for which the Defendant is not on trial." However, Ohio Revised Code 2945.04 is concerned with the presumption of innocence, the definition of reasonable doubt and the duty of the trial judge in charging a jury with respect to those two matters. ORC 2945.59 was undoubtedly intended by the court and it is apparent from the quotation in the charge that the court attempted a paraphrase of that section.

In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

§ 2953.03 Transcript to be furnished; [indigent defendants].

(In pertinent part.)

* * * The judge of the trial court in a felony case may, because of the poverty of the defendant, in the interest of justice, order the bill of exceptions and transcript, or either, paid from the county treasury in the manner provided in section 2301.24 of the Revised Code, and order the amount in money so paid charged as costs in the case. In cases where the court grants a motion to prepare a bill of exceptions for the defendant at the expense of the state, as herein provided, and there is not sufficient time to file it, as provided by section 2945.65 of the Revised Code, the court shall extend such time, not exceeding thirty days from granting such motion.*

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* This section was passed July 23, 1959, effective November 6, 1959 with the exception that the second statutory reference in the session law was to Ohio Revised Code Section 2301.04, see 128 *Laws of Ohio* 144, 146 (1959). The second reference was properly to Section 2945.65 of the Revised Code. The legislature corrected the error at 129 *Laws of Ohio* 305, 306 (1961).

CERTIFICATE OF COURT OF COMMON PLEAS OF HAMILTON COUNTY, OHIO CRIMINAL NO. 79049.

(Filed October 15, 1963.)

This is to certify that the voir dire of the jury was not a part of the original record at the time the transcript of testimony was furnished to the defendant.

CHARLES E. WEBER,

Judge, Court of Common Pleas,
Hamilton County, Ohio.

ANDREWS STATEMENT.

Statement made by James Andrews, on WCPO-TV On June 15, 1961.

"Well, Mr. Ruf has been extremely upset and depressed ever since Leslie Stickler's financial dealings became public. Mr. Ruf lost his life's savings through loans made to Stickler. He felt responsible for the losses of his friends and relatives who also invested with Stickler. He has been unable to find a job and he has been very nervous. Mr. Ruf was in the office Tuesday morning to discuss his trial which was scheduled for next Monday. He was here for about two hours, he left at noon, and he has not been seen or heard from since that time.

I only hope that he will be located in time to go to trial on Monday so that his complete innocence of any criminal wrongdoing can be established." (Cf. B of E, 13, 17-18)

RESUME OF THE VOIR DIRE OMITTED FROM TRANSCRIPT FURNISHED APPELLANT.*

1. The prospective jurors examined totaled 21, (Folio A, i; Folio B, i). The defense exhausted its four pre-emptory challenges (Folio B, 27, 39, 60, 65), the limit in non-capital cases in Ohio. See Ohio Revised Code, Section 2945.22.

2. The following list briefly notes what each of the veniremen questioned said had been experienced with respect to publicity about the present appellant, his or her views on the capacity to be impartial and whether sworn or excused and for what reason: **

a. Daniel Carney—had heard of Stickler,*** had read about the case in the paper, but would not let it affect him (Folio A, 4; 28-29). Sworn a a juror (Cf. Folio B, 74).

b. Augustine Pitrolo—heard and read publicity "about the Stickler case" and probably saw television stories about it but would not be influenced by it (Folio A, 9; 33-34). Sworn as a juror (Cf. Folio B, 74).

c. Melvin Corman—only knowledge of the Stickler case "is from the paper" but would not be influenced by

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* This summary does not pertain to the issue of the denial of the reinterrogation requested in mid-trial when the body of John Ruf was found dead on the river bank with accompanying publicity except as the evidence of the exposure of the venireman, *before* Ruf was found, underlines the importance of the reinterrogation sought. Jurors in the box had already had one exposure when the discovery of Ruf's body potentially exposed them all again.

** Folio A contains *voir dire* for Thursday, June 15, 1961, and Folio B contains *voir dire* for the following day, Friday, June 16, 1961. A telecast interview with Ruf's attorney took place on the evening of June 15, 1961 (see Andrews Statement, Appendix 59).

*** Throughout this resumé, Appellant will be referred to by name.

that. Saw "just the headlines, more or less," did not believe he read the "whole article" and paid no attention to the 11 o'clock news. Thinks he could put what he heard or saw in the newspaper out of his mind and decide strictly on the evidence (Folio A, 10-11; 37-38). Sworn as a juror (Cf. Folio B, 74).

d. Charles Meyers—had seen the name (Stickler) in the paper but "didn't read too much of the detail" and would not be influenced. Did not form an opinion with respect to what the case was about. Did not understand what Stickler was accused of (Folio A, 12; 39-40). Excused by the state (Folio B, 32).

e. Daniel Romanello—had seen publicity on the Stickler matter in the newspapers. Felt he could give Stickler a fair trial. Formed no opinion from reading the newspapers (Folio A, 13-14; 42). Saw a program in which case was mentioned on Channel 5 but was not influenced by what he saw (Folio B, 7; 15). Excused by the state (Folio B, 21).

f. Mrs. Teryl Calhoun—had heard about Stickler matter in the newspaper. Disclaimed any influence. May have seen Stickler's face on television. No opinion as to what paper said. Had an opinion "that perhaps he is not guilty and the State has to prove it." (Folio A, 15; 44-45). Sworn as a juror (Cf. Folio B, 74).

g. Mrs. Myrtle Davis—had heard nothing about Stickler matter (Folio A, 16-17; 47). Excused by defense (Folio B, 65).

h. Mrs. Mildred Colegrove—read publicity in the newspaper on the Stickler matter. That reading would not influence her. Just read "the headlines" not the "full copy of it." Did not listen to any of the stories on television (Folio A, 18; 49). Excused by defense (Folio B, 39).

i. Mrs. Lavera Tucker—read the newspaper about Stickler but would not be influenced by her reading. Has seen just a few news releases, no television (Folio A, 19; 53). Excused by defense (Folio B, 60).

j. Paul Cash—had familiarity with Stickler matter, "just from what I read in the paper." Would not be influenced in the trial of the case (Folio A, 20-21). Saw the telecast on Channel 9 the night before (June 15, 1961). Believes that anybody who saw it "would have formed an opinion" prejudicial to Stickler (Folio B, 7; 8-9). Challenged for cause by the defense and removed (Folio B, 9).

k. Matthew Vilas—knew Mr. Hanfbauer, one of the men involved in a transaction with Stickler. Thought he could give an honest verdict (in spite of) that fact. In same business as Hanfbauer and right around corner from him but did not know him intimately. Had not discussed the case with Hanfbauer. Sometimes did business with him. Had heard Hanfbauer was lending money and read his name in the newspaper. Would feel no duty to Hanfbauer, nor give his word any greater credence than other (witnesses). Juror's company and that of Hanfbauer had shared profits. Thought, however, that he could view Hanfbauer as a "person who had never seen him before" (Folio A, 5-7; 21; 55-59). Juror Vilas had "an open mind as far as the trial is concerned" but thought television and newspapers influence everybody "to a certain extent." Could not definitely say whether it had influenced him. Did not believe television broadcast of the night before influenced him as to Stickler because he did not actually know details. However, had talked to different people and heard things. "But, truthfully, I may have formed an opinion. I don't know. * * * Maybe it would be best I get off. * * *." (Folio B, 16-18). Challenge for cause denied

(Folio B, 18). After further interrogation of Juror Vilas by court on his ability to render a fair and impartial verdict, the challenge for cause was again overruled (Folio B, 18-19). Excused by defense (Folio B, 27).

l. Magdalena McBeth—heard the radio and read the newspapers "but I didn't read too much about it" (Stickler case). "I just remember the name." Could give Stickler a fair trial. Had been a patient of Dr. Shapiro but this would not influence Juror McBeth if the Doctor was a witness (Folio A, 22-23; 26-27; 59-60). Excused by the State (Folio B, 49-50).

m. Delbert May—had seen the news stories about the case but had not read them in detail. This would not prevent his fairly and impartially judging the case. Did not see the telecast of the night before (June 15, 1961) on Channel 9, but did see the 11 o'clock news on Channel 5 where the case was discussed. Did not remember any reference to John Ruf. No opinion formed as a result of reading or viewing (Folio B, 10-11; 12-13). Sworn as juror (Cf. Folio B, 74).

n. Mrs. Catherine Wolf—read about Stickler in newspaper sometime ago. This would not prevent impartial judgment of evidence in the case. Did not see telecast of night before. But "now that I am on the jury I read about it this morning and last night." Read the front page story about Ruf but that would not influence juror so far as Stickler was concerned (Folio B, 22-23; 24-26). Sworn as a juror (Cf. Folio B, 74).

o. Michael Orso—previous knowledge of Stickler case. "Just when it first broke in the paper. I don't know anything about it." Could put aside what he had read and judge solely on what he heard in the courtroom. Did not see the television newscast of the night before. Formed

no opinion. Was out of town during publicity on the case in March, 1961 (Folio B, 28; 30-31). Sworn as juror (Cf. Folio B, 74).

p. Jerald Horsley—had seen the telecast of the night before and read the newspaper. Did not think seeing the telecast nor previous reading would interfere with his impartial judgment. Formed no opinion. Juror said "I can't say it didn't influence me, but I truthfully believe now that it didn't." Then he said, "I can't say it influenced me, but I believe the program last night didn't influence me." Despite what he had heard or read, he would presume Stickler innocent "at this point" (Folio B, 33-34; 36-38; 73). Sworn as juror (Cf. Folio B, 74).

q. Daniel Grace—had not watched television on the night of June 15, 1961. Had "more or less just glanced over the newspapers about the case." This would not prevent fair and impartial judging in the case. Saw John Ruf's picture in this morning's newspaper (June 16, 1961). Had glanced at stories about the case before but formed no opinion (Folio B, 42; 44-46). Sworn as juror (Cf. Folio B, 74).

r. Arnold Stump—had read about Stickler matter in newspapers. Did not see anything on T.V. "last night." Might be influenced by what he had read. Not sure whether he could "wipe it out." Thinks he could decide case only on the evidence in court. Then—

> Q. You have an opinion at this time that Mr. Stickler is guilty, is that it?
>
> A. That is the way I feel about it.

(Folio B, 51-54). Challenged by defense for cause and excused (Folio B, 54).

s. Miss Vernetta Lewis—had heard Stickler's name "just this week." Had heard nothing about the case.

Could give Stickler a fair trial. Had not read about case in the newspapers. Heard prospective jurors talking about it but did not hear anything from them about the facts. There was no discussion of newspaper articles (Folio B, 55; 56-57). Sworn as juror (Cf. Folio B, 74).

t. Edward Stanton—had heard of Stickler matter on television and read about it in the newspapers. Did not see T.V. broadcast "last night." Would not allow prior information to influence him. Read the morning paper (June 16, 1961) about Ruf but did not form an opinion concerning Stickler. Might know the persons on the list of possible witnesses but not by name. Would "judge them on the facts" (Folio B, 60-61; 62-63). Sworn as juror (Cf. Folio B, 74).

u. Mrs. Ruth Hall—had heard Stickler's name but knew nothing about the Stickler matter. Had not "went through it" in the newspapers. "Last night I didn't look at television." No reason why she could not give Stickler a fair trial. Had not read "this morning's paper" (June 16, 1961). Did not read the paper through at any time (Folio B, 66; 67-68). Sworn as juror (Cf. Folio B, 74).

3. Of twenty-one veniremen questioned on the initial *voir dire*, twelve were sworn as jurors, two were excused for cause, the state excused three and the defense peremptorily challenged four.

4. Eighteen of twenty-one veniremen had information about the Stickler matter from reading newspapers, watching television or listening to the radio. Another had heard Stickler's name mentioned as the prospective jurors talked among themselves.

5. Of the twelve jurors finally sworn eleven had heard about the case through news media and the twelfth had heard Stickler's name mentioned.

6. The defense was forced to use one per-emptory challenge to remove a prospective juror whose challenge for cause was overruled despite his admitting that he might have formed an opinion and "maybe it would be best" if he got off (see 2(k) above).

TRIAL COURT'S ADMONITIONS TO JURY—RADIO, TELEVISION AND NEWSPAPER PUBLICITY.

1.* "We are all influenced when we talk. We had that question raised this morning about the broadcast last night.** We are influenced, whether we think we are or not * * * (B of E, 39).

"Now, in addition to that, since there was an occurrence of a broadcast** and, of course, there are publications, all of these institutions, newspapers, radio and television, they have a right, under the law of free expression, to express themselves. There are certain limits, but they usually know what those limits are, and they are guided accordingly, so that is their responsibility. But may I caution you, because of the nature of this case, and because of its news value, that anything that appears as news, that is to inform the public, but that is not evidence, and it may not give you the effect of the evidence and it cannot be considered by you. So while I can't control your thoughts while you are sitting as jurors, you may have a thought this way or that way, I can't control that. Probably you can't. But you can refrain, it seems to me, physically from subjecting yourself to reading the newspapers while the trial is going on, listening to broadcasts, if there is any about this case. Just resist the temptation."

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* This was part of the admonition delivered on Friday, June 16, 1961, at the end of the day (B of E, 39-40).

** The Andrews Statement, Appendix 59.

2.* "Remember the caution of the Court, do not talk about the case, permit anybody to talk to you, or talk among yourselves about the case. And as far as it is humanly possible, we are all human, resist any reading about the case. That is published for news purposes. You are to rely upon the evidence as it is given in the Court and apply it according to the law, which the court gives you."

"I again emphasize it is very important that you keep your mind absolutely open until the case is finally submitted to you for deliberation."

3.** "Remember the caution of the Court, do not talk about the case to anybody, talk among yourselves, or permit anybody to talk to you, and as far as it is humanly possible, avoid any newspaper information or radio or television information."

ORDER OF THE SUPREME COURT OF OHIO.

(Entered August 5, 1963.)

On written request of counsel for appellant and for good cause shown, it is ordered that the time for docketing this case in The Supreme Court of the United States is extended to November 1, 1963.

KINGSLEY TAFT,

Chief Justice. (Tr. I, 193)

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* This was the whole admonition delivered on Tuesday, June 20, 1961, at the end of the day (B of E, 203).

** This was the whole admonition delivered on Wednesday, June 21, 1961, at the end of the day (B of E, 301).